

**REMARKS**

Claims 1 through 14 and 33 through 94 are pending in this Application. Claims 1 through 8, 10 through 14, and 33 through 64 have been amended, claims 15 through 32 have been cancelled without prejudice or disclaimer, and new claims 65 through 94 added. Care has been exercised to avoid the introduction of new matter. Adequate descriptive support for the present Amendment is apparent throughout the originally filed disclosure. For the Examiner's convenience, Applicant notes that claims 33 through 47 and 85 through 92 and claims 66 through 84 and 94 were intended to encompass and more clearly define the subject matter originally presented in claims 33 through 47 and claims 10 through 32, respectively. Applicant submits that the present Amendment does not generate any new matter issue.

**PRELIMINARY STATEMENT**

The present Application is part of a series of Applications directed to a personal nutrition controlled dietary system. In Application No. 10/151,106 (U.S. 2003/0219513) the claimed system involves multiple packages containing different types of food but of a uniform caloric content, e.g., 100 calories, thereby facilitating calorie counting simply by counting packages rather than counting calories directly. In such a system the packages having a uniform caloric content, e.g., 100 calories, are provided by a food manufacturer with an attendant increased cost to consumers by virtue of such convenience. Notwithstanding such increased cost, the dietary system has proved to be a commercial success.

In Application No. 11/147,253 (U.S. 2005/0226970) the personal nutrition dietary system was expanded to provide additional flexibility and cost reduction to the consumer by enabling the consumer to provide uniform caloric content portions of different types of food. In accordance

with the enclosed embodiments, a dietary system was provided with a plurality of devices, each capable of measuring the same caloric content but for a different type of food. This type of system enables a consumer to purchase larger packages of different foods, at a quantity-reduced price, and then mete out uniform caloric portions to facilitate nutritional control, thereby balancing the convenience of prepackaged portions having a uniform caloric content with the economic exigencies of the consumer.

The present disclosure extends that personal nutrition control dietary concept to the food retailer by providing, *inter alia*, devices that apportion food based upon the predetermined number of calories, e.g., 100 calories, input into the device by the user, and point of sale devices which determine the number of calories associated with a particular weight of a particular type of food. The calorie driven concept of the present claims is neither disclosed nor suggested by the applied prior art.

### **OBJECTION/REJECTIONS**

In the Office Action mailed December 5, 2008, the Examiner: objected to claim 6 based on a typographical error; and rejected claims 33 through 55 under 35 U.S.C. § 101 as being directed to nonstatutory subject matter; rejected claims 1 through 47 and 56 through 64 under 35 U.S.C. § 112, second paragraph, as being indefinite; rejected claims 1 through 3, 5, 7, 10 through 12, 19, 20, 23, and 25 under 35 U.S.C. § 102(b) as anticipated by Missler et al. (US 6,359,239); rejected claims 26, 27, and 29 through 31 under 35 U.S.C. § 102(b) as anticipated by Overman (US 5,483,472); rejected claims 56 through 58, and 64 under 35 U.S.C. § 102(b) as anticipated by Rhee (US 2001/0043968); rejected claims 33 and 36 through 38 under 35 U.S.C. § 102(e) as anticipated by Arrendale, III et al. (US 2004/0045202); rejected claims 40 and 42 through 46 under 35 U.S.C. § 102(e) as anticipated by Bukowski (US 2003/0106940); rejected claims 48 and

49 under 35 U.S.C. § 102(e) as anticipated by Morris et al. (US 2004/0138820); rejected claims 4, 6, 13, and 22 as obvious under 35 U.S.C. § 103 based on Missler et al. (US 6,359,239); rejected claim 8 as obvious under 35 U.S.C. § 103 based on Missler et al. (US 6,359,239) in view of Prussia et al. (US 5,32,030); rejected claims 14 through 18, 21, and 24 as obvious under 35 U.S.C. § 103 based on Missler et al. (US 6,359,239) in view of Overman (US 5,483,472); rejected claim 28 as obvious under 35 U.S.C. § 103 based on Overman (US 5,483,472); rejected claim 32 as obvious under 35 U.S.C. § 103 based on Overman (US 5,483,472) in view of Morris et al. (US 2004/0138820); rejected claims 34, 35, and 39 as obvious under 35 U.S.C. § 103 based on Arrendale, III et al. (US 2004/0045202); rejected claims 41 and 47 as obvious under 35 U.S.C. § 103 based on Bukowski (US 2003/0106940); rejected claim 50 as obvious under 35 U.S.C. § 103 based on Morris et al. (US 2004/0138820); rejected claim 51 as obvious under 35 U.S.C. § 103 based on Morris et al. (US 2004/0138820) in view of Bukowski (US 2003/0106940); rejected claims 52 through 55 as obvious under 35 U.S.C. § 103 based on Morris et al. (US 2004/0138820) in view of Arrendale, III et al. (US 2004/0045202); rejected claims 59 and 62 as obvious under 35 U.S.C. § 103 based on Rhee (US 2001/0043968); rejected claim 60 as obvious under 35 U.S.C. § 103 based on Rhee (US 2001/0043968) in view of Bukowski (US 2003/0106940); and rejected and claims 61 and 63 as obvious under 35 U.S.C. § 103 based on Rhee (US 2001/0043968) in view of Arrendale, III et al. (US 2004/0045202). Each rejection is traversed.

### **Claim Objection**

The Examiner objected to claim 6, identifying an informality correctly attributed to a typographical error.

In response, the typographical oversight noted by the Examiner has been corrected. Accordingly, withdrawal of the objection to claim 6 is solicited. The Examiner's perspicacity is appreciated.

**Claims 33 through 55 were rejected under 35 U.S.C. § 101 as directed to non-statutory subject matter.**

This rejection is traversed.

Specifically, the rejected claims have been recast in terms of packages of food with significant indications thereon relating to the number of calories thereby facilitating calorie counting and nutrition control (claims 33-47 and 85-92), and in terms of a method for determining, and presenting to a consumer, nutritional content in accordance with a predetermined number of calories for a food product (claims 48-55 and 93). Clearly, these claims, directed to a "package" or a "plurality of packages" of food, and to a method of determining nutritional content of a food product, comprising a series of manipulative steps, fall within the ambit of 35 U.S.C. § 101, at least as an "article of manufacture," and a "process," respectively.

Based upon the foregoing Applicant solicits reconsideration and withdrawal of the imposed rejection of claims 33 through 55 under 35 U.S.C. § 101 as directed to non-statutory subject matter.

**Claims 1 through 47 and 56 through 64 were rejected under the second paragraph of 35 U.S.C. § 112.**

In the statement of rejection the Examiner identified various perceived bases asserted to render the claimed subject matter indefinite. This rejection is traversed.

In response, the present Amendment addresses various issues raised by the Examiner thereby overcoming the stated bases for the imposed rejection. For example, transitional phrases have been provided, the expression “ERP” has been defined, and antecedent basis issues have been addressed. Applicant notes, however, that the term “about” does not render the claimed invention indefinite as it is reasonably precise in light of the subject matter involved. Applicant is entitled to reasonable scope in light of the particular subject matter involved. *Zoltek Corp. v. United States*, 48 Fed. Cir. 240 (Fed. Cir. 2000); see also *Andrew Corp. v. Gabriel Electronics, Inc.*, 847 F.2d 819 (Fed. Cir. 1988).

Based upon the foregoing, Applicant submits that one having ordinary skill in the art would have no difficulty understanding the scope of the claimed invention, particularly when reasonably interpreted and in light of and consistent with the written description of the specification, which is the judicial standard. *Miles Laboratories, Inc. v. Shandon, Inc.*, 997 F.2d 870 (Fed. Cir. 1993). Applicant, therefore, submits that the imposed rejection of claims 1 through 47 and 56 through 64 under the second paragraph of 35 U.S.C. § 112 is not legally viable and, hence, solicits withdrawal thereof.

**Acknowledgement of the patentability of the subject matter of claim 9.**

Applicant gratefully acknowledges the Examiner’s apparent recognition of the patentability of the subject matter of claim 9 over the prior art, since claim 9 was not rejected under 35 U.S.C. § 102 or 35 U.S.C. § 103.

**Claims 1 through 3, 5, 7, 10 through 12, 19, 20, 23, and 25 were rejected under 35 U.S.C. § 102 for lack of novelty as evidenced by Missler et al.**

In the statement of rejection the Examiner asserted that Missler et al. disclose subject matter corresponding to that claimed. This rejection is traversed.

The factual determination of lack of novelty under 35 U.S.C. § 102 requires the identical disclosure in a single reference of each element of a claimed invention, as those elements are set forth in the claims, such that the claimed invention is placed into the recognized possession of one having ordinary skill in the art. *Praxair, Inc. v. ATMI, Inc.*, 543 F.3d 1308, (Fed. Cir. 2008); *Dayco Prods., Inc. v. Total Containment, Inc.*, 329 F.3d 1358 (Fed. Cir. 2003); *Crown Operations International Ltd. v. Solutia Inc.*, 289 F.3d 1367 (Fed. Cir. 2002); *Candt Tech Ltd. v. Resco Metal & Plastics Corp.*, 264 F.3d 1344 (Fed. Cir. 2001). There are fundamental differences between the claimed device and the device disclosed by Missler et al. that scotch the allegation that Missler et al. disclose, or even remotely suggest, a device identically corresponding to those claimed.

Specifically, independent claim 1 is directed to a “device for apportioning food, the device being configured to provide, in response to user input, a portion of food having a predetermined number of calories.” By its own terms, the claimed device is configured to provide a portion of food in response to user input relating to a predetermined number of calories. By contrast, the scale disclosed by Missler et al. does not apportion anything in response to user input with respect to a predetermined number of calories. Rather, as disclosed by Missler et al., the user simply slices food on a cutting board and then weighs it on a separately

supported scale. Any portioning disclosed by Missler et al. is performed by the user in slicing the food, and not by the device itself.

Furthermore, the notion of portioning food depending upon a predetermined number of calories input to the device is neither disclosed nor remotely suggested by Missler et al..

Applicant also notes that newly presented independent claim 66 is directed to an apparatus configured to weigh food and then determine the number of calories associated with the particular weight and particular type of food. The apparatus is further configured to provide additional nutritional information based upon the number of calories and then to determine a price for the weighed food. This is a far cry from the apparatus disclosed by Missler et al., which is, as its title suggests, a “cutting board with integral scale”. The device disclosed by Missler et al. does not weigh the food, determine the number of calories, and then provide additional nutritional information based upon the number of calories, and then provide a price. Certainly, the device disclosed by Missler et al. is not a point-of-sale type of device as specified in claim 67.

The above argued clear and fundamental differences between the claimed portioning device (claim 1) and apparatus (claim 66), on the one hand, and the “cutting board with integral scale” disclosed by Missler et al., on the other hand, scotch the Action's allegation that Missler et al. disclose, or even remotely suggest, a portioning device and apparatus identically corresponding to those claimed. *Minnesota Mining & Manufacturing Co. v. Johnson & Johnson Orthopaedics Inc.*, 976 F.2d 1559 (Fed. Cir. 1992); *Kloster Speedsteel AB v. Crucible Inc.*, 793 F.2d 1565 (Fed. Cir. 1986). Applicant, therefore, submits that the rejection of claims 1 through 3, 5, 7, 10 through 12, 19, 20, 23, and 25 under 35 U.S.C. § 102 for lack of novelty as evidenced by Missler et al. is not factually viable and, hence, solicits withdrawal thereof.

**Claims 26, 27, and 29 through 31 were rejected under 35 U.S.C. § 102 for lack of novelty as evidenced by Overman.**

In the statement of rejection, the Examiner asserted that Overman discloses a register identically corresponding to that claimed. This rejection is traversed.

Claims 26, 27, and 29 through 31 have been cancelled and, hence, this rejection has been rendered moot. The rejected claims have been replaced by claims 66-84. Independent claim 66 is directed to an apparatus configured to weigh food and determine the number of calories associated with the particular weight and particular type of food, to provide additional nutritional information based on the number of calories and the particular type of food, and to determine the price for the weighed food. The claimed apparatus is designed as a “point-of-sale terminal,” as in claim 67, the patentability of which is hereby separately advocated. In addition, claims 69 and 70 require the use of predefined associations for an external storage location. It should be apparent that the claimed invention does not remotely resemble the portable electronic food shopper disclosed by Overman.

Applicant would again stress the basic tenet that the factual determination of lack of novelty under 35 U.S.C. § 102 requires the identical disclosure in a single reference of each element of a claimed invention, as those elements are set forth in the claims, such that the claimed invention is placed into the recognized possession of one having ordinary skill in the art.

*Prax Air, Inv. v. ATMI, supra; Dayco Prods., Inc. v. Total Containment, Inc., 329 F.3d 1358 (Fed. Cir. 2003); Crown Operations International Ltd. v. Solutia Inc., 289 F.3d 1367 (Fed. Cir. 2002); Candid Tech Ltd v. Briscoe Metals and Plastics, supra.* There are significant differences between the claimed apparatus and the portable electronic food shopper disclosed by Overman

that scotch the allegation that Overman discloses an apparatus identically corresponding to that claimed.

Indeed, the portable electronic food shopper disclosed by Overman is nothing more than a shopping list device to facilitate shopping by a consumer. To begin with, the device disclosed by Overman is not an apparatus that weighs food, as defined in claim 66. Moreover, the device disclosed by Overman does not provide the additional nutritional information and price as set forth in independent claim 66. Certainly, it is not a point of sale terminal as in claim 67 and does not utilize predefined associations from an external storage location as in claims 69 and 70.

The above argued differences between the claimed apparatus and the portable electronic food shopper disclosed by Overman undermine the allegation that Overman discloses or even remotely suggests an apparatus identically corresponding to that claimed. *Minnesota Mining & Manufacturing Co. v. Johnson & Johnson Orthopaedics Inc., supra; Kloster Speedsteel AB v. Crucible Inc., supra*. Applicant, therefore, submits that the imposed rejection of claims 26, 27 and 29 through 31 under 35 U.S.C. § 102 for lack of novelty as evidenced by Overman is not factually applicable to claims 66-84.

**Claims 56 through 58 and 64 were rejected under 35 U.S.C. 102 for lack of novelty as evidenced by Rhee.**

In the statement of rejection the Examiner asserted that Rhee discloses food products identically corresponding to that claimed. This rejection is traversed.

There are fundamental differences between the claimed food package disclosed by Rhee that undermine the allegation of lack of novelty under 35 U.S.C. § 102. Specifically, claim 56 is directed to a packaging material for packaging a plurality of **different types of food products**

in an assembly of food products and displaying the caloric content of each of the different types of food products. Moreover, the claimed packaging material has an indication thereon of the number of calories for each of the different types of food products being 50 or a multiple thereof.

Rhee neither discloses nor suggests packaging material for packaging a plurality of **different types of food products** in an assembly of food products and displaying the caloric content of each of the different types of food products. Rather, Rhee merely discloses packaging **individual** food products with the packaging for each individual food product having a caloric content thereon. And certainly Rhee does not disclose or suggest an indication on the packaging material of the number of calories for each of the different types of food products being 50 or a multiple thereof.

These dramatic differences undermine the allegation that Rhee discloses packaging material identically corresponding to that claimed. *Minnesota Mining & Manufacturing Co. v. Johnson & Johnson Orthopaedics Inc., supra; Kloster Speedsteel AB v. Crucible Inc., supra.*

Applicant, therefore, submits that the imposed rejection of claims 56 through 58, and 64 under 35 U.S.C. § 102 for lack of novelty as evidenced by Rhee is not factually viable and, hence, solicits withdrawal thereof.

**Claims 33 and 36 through 38 were rejected under 35 U.S.C. § 102 for lack of novelty as evidenced by Arrendale et al.**

In the statement of the rejection the Examiner asserted that Arrendale et al. disclose a display corresponding to that claimed. This rejection is traversed.

Claim 33 has been clarified by reciting a package containing multiple servings of food with indications of the approximate total number of calories of food in the package, with an indication of the approximate number of calories of one of the multiple servings wherein the two approximate numbers are different. This is quite different from the package labeling disclosed by Arrendale et al. for the nutritionally-enhanced composite food material with a predictable nutrient amount. Arrendale et al. simply do not disclose nor suggest a package with multiple servings of the food as claimed.

The above argued difference between the claimed package and the labeling for a nutritionally-enhanced composite food material with a predictable nutrient amount by Arrendale et al. undermines the allegation that Arrendale et al. disclose a package identically corresponding to that claimed. *Minnesota Mining & Manufacturing Co. v. Johnson & Johnson Orthopaedics Inc., supra; Kloster Speedsteel AB v. Crucible Inc., supra.*

Applicant, therefore, submits that the imposed rejection of claims 33 and 36 through 38 under 35 U.S.C. § 102 for lack of novelty as evidenced by Arrendale et al. is not factually viable and, hence, solicits withdrawal thereof.

**Claims 40 and 42 through 46 were rejected under 35 U.S.C. § 102 for lack of novelty as evidenced by Bukowski.**

In the statement of rejection the Examiner asserted that Bukowski discloses displays corresponding to that claimed. This rejection is traversed.

Claim 40 has been clarified by specifically reciting packages of food. Clearly, the medical diagnostic monitoring apparatus and system disclosed by Bukowski in no way amounts to or suggests the packages of food as claimed, thereby scotching the allegation of novelty under

35 U.S.C. §102. *Minnesota Mining & Manufacturing Co. v. Johnson & Johnson Orthopaedics Inc.*, *supra*; *Kloster Speedsteel AB v. Crucible Inc.*, *supra*.

Applicant, therefore, submits that the imposed rejection of claims 40 and 42 through 46 under 35 U.S.C. § 102 for lack of novelty as evidenced by Bukowski is not factually viable and, hence, solicits withdrawal thereof.

**Claims 48 and 49 were rejected under 35 U.S.C. § 102 for lack of novelty as evidenced by Morris et al.**

In the statement of rejection the Examiner asserted that Morris et al. disclose a method corresponding to that claimed. This rejection is traversed.

The method defined in independent claim 48 comprises a sequence of manipulative steps which includes receiving input corresponding to a food product, determining the calorie content of the food product based on the input, deriving the nutritional content of the food product in accordance with a predetermined number of calories based on the calorie content, and then presenting the nutritional content to a consumer in accordance with the predetermined number of calories. No such method is disclosed or even suggested by Morris et al. Indeed, the method disclosed by Morris et al. is based on assigning an “Amples” value to food items based on a mathematical calculation involving kilocalories. The manipulative steps of the claimed invention, including receiving input, determining caloric content, deriving nutritional content, and presenting that result to consumers based on the predetermine number of calories are neither disclosed nor suggested by Morris et al.

The above argued fundamental differences between the claimed method and the methodology disclosed by Morris et al. undermine the allegation that Morris et al. disclose a method identically corresponding to that claimed. *Minnesota Mining & Manufacturing Co. v. Johnson & Johnson Orthopaedics Inc.*, *supra*; *Kloster Speedsteel AB v. Crucible Inc.*, *supra*. Applicant, therefore, submits that the imposed rejection of claims 48 and 49 under 35 U.S.C. § 102 for lack of novelty as evidenced by Morris et al. is not factually viable and, hence, solicits withdrawal thereof.

**Claims 4, 6, 13, and 22 were rejected under 35 U.S.C. § 103 for obviousness predicated upon Missler et al.**

Claims 4 and 6 depend from independent claim 1. Claim 13, as amended, now also depends from independent claim 1 through dependent claim 4. Original claims 4 and 13 contained features, viz., conversion made through ERP, now in claim 11, for example. Claim 22 has been canceled.

Applicant incorporates herein the arguments previously advanced in traversing the rejection of claim 1 under 35 U.S.C. § 102 for lack of novelty as evidenced by Missler et al. The Examiner's additional comments with respect to claims 4, 6, 13, and 22 do not cure the previously argued deficiencies of Missler et al. Accordingly, even if the cutting board with integral scale disclosed by Missler et al. was modified as suggested by the Examiner, and Applicant does not agree that the requisite realistic motivation has been established to so modify, the claimed invention would not result. As argued above, any portioning disclosed by Missler et al. is performed by the user in slicing the food, and not by the device itself. Furthermore, as argued above, the notion of portioning food depending upon a predetermined number of calories

input to the device is not remotely suggested by Missler et al.    *Uniroyal, Inc. v. Rudkin-Wiley Corp.*, 837 F.2d 1044 (Fed. Cir. 1988).

Based upon the foregoing, Applicant submits that the imposed rejection of 4, 6, 13, and 22 under 35 U.S.C. § 103 for obviousness predicated upon Missler et al. is not factually or legally viable and, hence, solicits withdrawal thereof.

**Claim 8 was rejected under 35 U.S.C. § 103 for obviousness predicated upon Missler et al. in view of Prussia et al.**

In the statement of the rejection the Examiner concluded that one having ordinary skill in the art would have been motivated to modify the invention of Missler et al. by incorporating a portable firmness testing device to identify ripe fruits in view of Prussia et al. This rejection is traversed.

Initially, claim 8 depends from independent claim 1. Applicant incorporates herein the arguments advanced in traversing the rejection of claim 1 under 35 U.S.C. § 102 for lack of novelty and the previous arguments advanced under 35 U.S.C. § 103 as allegedly obvious as evidenced by Missler et al. Simply put, for the reasons stated previously, Missler et al. does not obviate claim 1 or any claim dependent on claim 1. The secondary reference to Prussia et al. does not cure the argued deficiencies of Missler et al.

Further, Applicant separately argues the patentability of claim 8. Simply put, it is inconceivable that one having ordinary skill in the art would have been motivated to modify the device of Missler et al., which is a **cutting board** with integral scale, by providing a nondestructive firmness measuring device for fruits as disclosed by Prussia et al. The Action's rejection appears to overlook the fact that the device of Missler et al. is designed to cut food. In

that context, it is difficult to envision why one having ordinary skill in the art would somehow have incorporated the nondestructive fruit firmness measuring capability disclosed by Prussia et al.

Based upon the foregoing Applicant submits that the imposed rejection of claim 8 under 35 U.S.C. § 103 for obviousness predicated upon Missler et al. through Prussia et al. is not factually or legally viable and, hence, solicits withdrawal thereof.

**Claims 14 through 18, 21, and 24 were rejected under 35 U.S.C. § 103 for obviousness predicated upon Missler et al. through Overman.**

In the statement of rejection the Examiner asserted that one having ordinary skill in the art would have been motivated to modify the device of Missler et al. by providing a capability to compute the price, in view of Overman. This rejection is traversed.

Claims 15 through 18, 21, and 24 have been canceled. Claim 14 depends from independent claim 1. Applicant incorporates herein the arguments previously advanced in traversing the imposed rejection of claim 1 under 35 U.S.C. §§ 102 and 103 based on Missler et al. The secondary reference to Overman does not cure the previously argued deficiencies of Missler et al.

Accordingly, even if the applied references are combined as suggested by the Examiner, and Applicant does not agree that the requisite realistic motivation has been established, the claimed invention would not result. *Uniroyal, Inc. v. Rudkin-Wiley Corp., supra*.

Applicant, therefore, submits that the imposed rejection of claims 14 through 18, 21, and 24 under 35 U.S.C. § 103 for obviousness predicated upon Missler et al. in view of Overman is not factually or legally viable and, hence, solicits withdrawal thereof.

**Claim 28 was rejected under 35 U.S.C. § 103 for obviousness predicated upon Overman.**

Claim 28 has now been canceled, making its rejection moot.

**Claim 32 was rejected under 35 U.S.C. § 103 for obviousness predicated upon Overman in view of Morris et al.**

Claim 32 has now been canceled, making its rejection moot.

**Claims 34, 35, and 39 were rejected under 35 U.S.C. § 103 for obviousness predicated upon Arrendale et al.**

This rejection is traversed.

Claims 34, 35, and 39 depend from independent claim 33. Applicant incorporates herein the arguments previously advanced in traversing the imposed rejection of claim 33 under 35 U.S.C. § 103 for obviousness predicated upon Arrendale et al. The Examiner's additional comments with respect to claims 34, 35 and 39 do not cure the previously argued deficiencies of Arrendale et al. Further, in support of this rejection the Examiner simply offers conclusions without including any rational underpinning. *In re Kahn*, 441 F.3d 977, 78 USPQ2d 1329 (Fed. Cir. 2006). Clearly, the requisite motivational element has not been established.

Based upon the foregoing, Applicants submit that the imposed rejection of claims 34, 35, and 39 under 35 U.S.C. § 103 for obviousness predicated upon Arrendale et al. is not factually or legally viable and, hence, solicits withdrawal thereof.

**Claims 41 and 47 were rejected under 35 U.S.C. § 103 for obviousness predicated upon Bukowski.**

This rejection is traversed.

Claims 41 and 47 depend from independent claim 40. Applicant incorporates herein the arguments previously advanced in traversing the imposed rejection of claim 40 under 35 U.S.C. § 102 for lack of novelty as evidenced by Bukowski. The Examiner's additional comments with respect to claims 41 and 47 do not cure the previously argued deficiencies of Bukowski.

Further, Applicant separately argues the patentability of claims 41 and 47 based upon the limitations expressed herein. The Examiner's attempt to establish the requisite motivation is not supported by any rational underpinning for the proposed modification. *In re Kahn, supra.*

Applicant, therefore, submits that the imposed rejection of claims 41 and 47 under 35 U.S.C. § 103 for obviousness predicated upon Bukowski is not factually or legally viable and, hence, solicits withdrawal thereof.

**Claim 50 was rejected under 35 U.S.C. § 103 for obviousness predicated upon Morris et al.**

**Claim 51 was rejected under 35 U.S.C. § 103 for obviousness predicated upon Morris et al. in view of Bukowski.**

**Claims 52 through 55 were rejected under 35 U.S.C. § 103 for obviousness predicated upon Morris et al. in view of Arrendale et al.**

Each of the above rejections of claims 50, 51, and 52 through 55 is traversed.

Applicant incorporates herein the arguments previously advanced in traversing the imposed rejection of claim 48 under 35 U.S.C. § 102 for lack of novelty as evidenced by Morris

et al. The Examiner's additional comments with respect to claim 50, reliance upon Bukowski with respect to claim 51, and reliance upon Arrendale et al. with respect to claims 52 through 55, do not cure the previously argued deficiencies of Morris et al. Accordingly, even if the method disclosed by Morris et al. is modified as suggested by the Examiner, and Applicant again does not agree that the requisite motivation has been established, the claimed invention would not result. *Uniroyal, Inc. v. Rudkin-Wiley Corp., supra.*

Applicant, therefore, submits that the imposed rejection of claim 50 under 35 U.S.C. § 103 for obviousness predicated upon Morris et al., the imposed rejection of claim 51 under 35 U.S.C. § 103 for obviousness predicated upon Morris et al. in view of Bukowski, and the imposed rejection of claims 52 through 55 under 35 U.S.C. § 103 for obviousness predicated upon Morris et al. in view of Arrendale et al., are not factually or legally viable and, hence, solicit withdrawal thereof.

**Claims 59 and 62 were rejected under 35 U.S.C. § 103 for obviousness predicated upon Rhee.**

**Claim 60 was rejected under 35 U.S.C. § 103 for obviousness predicated upon Rhee in view of Bukowski.**

**Claims 61 and 63 were rejected under 35 U.S.C. § 103 for obviousness predicated upon Rhee in view of Arrendale et al.**

Each of the above rejections of claims 59 and 62, 60, and 61 and 63 is traversed.

Claims 51 through 63 depend from independent claim 56. Applicant incorporates herein the arguments previously advanced in traversing the imposed rejection of claim 56 under 35 U.S.C. § 102 for lack of novelty as evidenced by Rhee. The Examiner's additional comments

with respect to claims 59 and 62, reliance upon Bukowski, and reliance upon Arrendale et al., do not cure the previously argued deficiencies of Rhee. Accordingly, even if the food package disclosed by Rhee is modified as suggested by the Examiner, and again Applicant does not agree that the requisite realistic motivation has been established, the claimed invention would not result. *Uniroyal, Inc. v. Rudkin-Wiley Corp., supra.*

Applicant, therefore, submits that the imposed rejection of claims 59 and 62 under 35 U.S.C. § 103 for obviousness predicated upon Rhee, the imposed rejection of claim 60 under 35 U.S.C. § 103 for obviousness predicated upon Rhee in view of Bukowski, and the imposed rejection of claims 61 and 63 under 35 U.S.C. § 103 for obviousness predicated upon Rhee in view of Arrendale et al., are not factually or legally viable and, hence, solicits withdrawal thereof.

### **New claims 64 through 94 and Summary**

Applicant has argued the patentability of the newly presented claims *supra*, where appropriate in traversing the Examiner's rejections. Based upon these arguments, Applicant submits that new claims 64 through 94 are free of the applied prior art.

In summary, and for the reasons presented *supra*, Applicant submits that none of the applied references taken singly or in combination disclose or suggest a portioning device as set forth in claims 1 through 14 and 65, a package as defined in claims 33 through 39, and 85 through 87, a plurality of packages as defined in claims 40 through 47 and 88 through 92, a method of presenting nutritional content based on calorie input as defined in claims 48 through 55 and 93, packaging material as defined in claims 56 through 64, an apparatus configured to weigh food, determine the number of calories in the food, determine nutritional information from the number of calories, and determining a price for the weighed food as defined in claims 66

through 84, and an apparatus that comprises a scale that displays nutritional information based on the calorie determination as defined in claim 94.

Based upon the foregoing, Applicant submits that each of the imposed objection and imposed rejections have been overcome and that all pending claims are in condition for immediate allowance. Favorable consideration is, therefore, solicited.

If any unresolved issues remain, it is respectfully requested that the Examiner telephone the undersigned attorney at (703) 519-9954 so that such issues may be resolved as expeditiously as possible.

To the extent necessary, a petition for an extension of time under 37 C.F.R. 1.136 is hereby made. Please charge any shortage in fees due in connection with the filing of this paper, including extension of time fees, to Deposit Account 504213 and please credit any excess fees to such deposit account.

Respectfully Submitted,  
DITTHAVONG MORI & STEINER, P.C.

April 1, 2009

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